Supreme Court, U. S.
FILED
JUL 19 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

SUMMER TERM, 1976

RONALD V. FALES,

Petitioner,

vs.

No. 76-74

SECRETARY OF HEALTH, EDUCATION & WELFARE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by RONALD V. FALES for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case.

I. OPINIONS DELIVERED IN COURTS BELOW

Neither the District Court, nor the Court of Appeals wrote a reported opinion in this case. The opinions of the District Court and the Court of Appeals are appended to this petition.

II. JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed is February 20, 1976, and the time of entry is February 20, 1976. An order granting an extension of time within which to file this petition was granted on May 18, 1976; said order extended the time to file the petition for writ of certiorari to and including July 19, 1976. The statutory provision believed to confer on this court jurisdiction to review the judgment in question is section 1254 of Title 28 of the United States Code.

III. QUESTIONS PRESENTED

The questions presented for review are:

1. Did the Court of Appeals abrogate and surrender its judicial duty to make a finding under the Social Se-

curity Act, in favor of a medical report which was not part of the record?

2. Did the Court of Appeals misconstrue and misapply the Social Security Act by its holding that a physician must state that the Petitioner is unable to engage in any substantial gainful activity prior to Petitioner being eligible for disability benefits under the Act?

3. Was the finding of the Administrative Law Judge that Petitioner's impairments were of such a limited severity that he could engage in substantial gainful activity, contrary to the record evidence before the Court?

IV. STATUTES INVOLVED

The statute of the United States the interpretation of which is involved is section 223 of the Social Security Act; 42 U.S.C.A. 423 pg. 682-683, which provides as follows:

Section 223 (d) (1) of the Social Security Act defines disability (except for certain cases of blindness) as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."

Section 223 (d) (2) (a) further provides that an individual (except a widow, surviving divorced wife, or widower for purposes of section 202 (e) or (f) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such a severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence with respect to any individual, "work which

exists in the national economy" means work which exists in significant numbers, either in the region where such individual lives or in several regions of the country.

223 (d) (3) Further states "for purposes of this subsection, a physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstratable by medically accepted clinic and laboratory diagnostic techniques.

Section 223 (d) (5) An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require.

V. STATEMENT OF CASE

(Numbers in parentheses preceded by "TR." refer to transcript.)

Mr. Fales, born April 25, 1928, is married and has no children. He has a sixth-grade education with an intelligence of dull-normal (I.Q. 85) (TR. 126). Mr. Fales has worked for varying lengths of time as a drill press operator, riveter, steeplejack, truck driver, demolition expert, coal miner, oilfield worker, painter and baker's helper.

In May 1963 Petitioner's eyes were injured when a grinding wheel broke and fragments lodged in his eye. The examination by Dr. Harold F. Falls, of Flint, Michigan, on July 25, 1963, revealed a traumatic macular cyst in the left eye and Dr. Falls stated that the Petitioner's visual acuity will remain poor in his left eye and he should not be subjected to any employment which would require good depth perception (TR. 118-119).

In February, 1965, the Petitioner was admitted to the Veteran's Administration Hospital in Ann Arbor, Michigan, for psychotherapy (TR. 122-123). The diagnosis was schizophrenic reaction believed to be the result of hypogonadism. Dr. Stanley J. Woolams of said hospital stated; "In addition though he (Fales) demonstrates a definite

paranoid trend, a loosening of associations, much problem with impulse control." (TR. 122)

In October, 1967, Petitioner was examined by Dr. M. Gueramy, a neurological surgeon of Bay City, Michigan, following a head injury resulting from being struck by a rifle butt (TR. 124-125). Dr. Gueramy stated; "This EEG was considered abnormal and compatible with organic lesion of the brain. This, also, may be evidence of subdural hematoma. I believe this patient is having some problem inside the cranium but it is not absolutely clear whether this is a subdural hematoma or contusions of the brain."

On April 6, 1970, the Petitioner was examined by Dr. William B. Redmon of Midland, Michigan (TR. 131). Dr. Redmon, an orthopedic surgeon reported that the Petitioner had received a groin injury while in the army resulting in a medical discharge from the army. The Petitioner had also suffered from a shoulder dislocation which required surgical placement of a pin in the shoulder. In 1965, the Petitioner stated that he had received a back injury which continued to give him problems. Dr. Redmon's examination showed a testicular injury resulting in a hormone imbalance, a chronic lumbosacral strain and a minor compression fracture in the lumbar strain.

On May 1, 1970, Dr. Dennis Egnatz of Midland, Michigan, examined the Petitioner and found him capable of fulltime sedentary work, but with limitations on stooping, lifting, reaching, pushing and pulling (TR. 134).

May 1, 1970, Petitioner submitted to another psychometric test and was classified as dull-normal with a full scale I.Q. of 85 (TR. 126). He was found to have a reading grade equivalent of 3.5 and an arithmetic grade equivalent grade of 4.2. The examiner stated; "It appears that on the job training situation at a workshop should not be ruled out. However, Mr. Fales might consider himself to be beyond this type of activity. He will quite likely consider himself to be beyond this type of activity. He will quite likely need counseling if this approach is tried." (TR. 127)

On May 25, 1970, a psychiatric examination was given the Petitioner by Dr. Yahya Kiyak of Midland, Michigan. Dr. Kiyak stated Petitioner's "only worry is being idle, unable to find a job, because he cannot pass the physical examinations." (TR. 135) Dr. Kiyak stated; "He could be called reactive depression to physical disability." (TR. 135)

January 19, 1971, an examination was conducted by Dr. Terence K. Tuttle, of Saginaw, Michigan, who noted the obesity of the Petitioner and suggested that the Petitioner had psychoneurosis and that further examination should be conducted to determine whether the Petitioner's problems are emotional, hematological or endocrine (TR. 142-143).

December 21, 1971, examination of the Petitioner was conducted by Dr. H. P. Velten at the University of Michigan Hospital in Ann Arbor, Michigan. Dr. Velten concluded that the EEG taken of the Petitioner indicated that he would have to be regarded as epileptic, "the convulsive disorder being secondary to brain trauma." (TR. 148) Dr. Velten also stated; "The patient was seen by internal medicine. Their impression was probably chronic obstructive lung disease." And "the patient weighs 235 pounds which is most likely due to exogenous factors." (TR. 148)

Dr. Redmon followed up his previous report when on September 20, 1972, he stated that "the basis problem appears to be a severe psychoneurosis. A number of conversion symptoms, at times, verging on symptoms that can only be described as the hysterical variety." (TR. 151)

A consultant examination was arranged with Dr. Arthur Basel, a psychiatrist of Auburn, Michigan, on April 12, 1973. Dr. Basel concluded that "It is felt that he (Petitioner) has just suffered too many setbacks in his life and realistically it is undoubtedly true that no one will hire him with the history he has." (TR. 156)

On the basis of these injuries the Petitioner filed an application to establish a period of disability insurance benefits on August 19, 1970, (TR. 63-66), and on June 27, 1972 (TR. 62-72) alleging that he became unable to work Decem-

ber 20, 1969 (at age 41) (TR. 63) and in the year 1967 (at age 35) (TR. 69).

The application of August 19, 1970, was denied on February 24, 1971. His application was also denied upon reconsideration by the Bureau of Disability Insurance of the Social Security Administration and after the Michigan State Agency upon evaluation of the evidence by a physical and disability examiner had found the Petitioner was not under disability (TR. 76-77).

Petitioner then requested a hearing before the Administrative Law Judge, before whom the Petitioner and his wife appeared. The Judge considered the case *de novo* on the basis of testimony and documents admitted in evidence.

At this administrative hearing Petitioner testified that he weighed 258 pounds and was 5 feet 9½ inches tall. He stated that he could not get around too much and hadn't done any yard work in five years for that reason (TR. 23). Petitioner stated that he occasionally had difficulty getting in and out of the bathtub and bathing himself (TR. 28). Further, he stated that he had been sleeping in a chair for four or five months and had to get up during the night because of the pain (TR. 29).

He testified and showed various prescribed medication including valium tablets, thorazine, as well as a prescription for two shots of cortisone in his knee caps every two weeks. Petitioner testified that he loved to work (TR. 40) and had recently tried a job at a bakery for one day, but that he had to quit because his legs swelled up. Also, that the same problem caused him to lose a job spray-painting trailers two years prior which was the last time he had worked for more than one day.

His legs were shown to the Administrative Law Judge who noted that they were swollen at the time of the hearing (TR. 46). Petitioner also testified as to the severe pain in his back due to arthritis in the spine and the headaches it causes him. He further stated that he had muscle spasms under his heart and a pinched nerve in his back which paralyzes his legs and causes him to fall (TR. 50-51); that he was a hemophiliac, that the center of his left eye was injured, and that his left shoulder had a pin in it (TR. 51-53).

Finally, he testified that he was steadily employed in 1969 but was fired for falsifying his application as to the fact that he had previously received workmen's compensation benefits. Petitioner admitted he lied on the application in an effort to get the job (TR. 55-56).

Petitioner's wife stated that her husband had tremendous headaches, and that he had problems with regard to his back, legs, and heart (TR. 57-59). Mrs. Fales testified that Petitioner occasionally goes off by himself and cries because he is unable to provide for his family (TR. 60-61).

On October 25, 1973, the Administrative Law Judge found the Petitioner was not under a disability through the effective period of the application of June 27, 1972. In rendering his decision the Administrative Law Judge found that the Petitioner suffered from the following medical impairments: obesity, psychoneurosis, hypogonadism, hemophilia, tobacco bronchitis, etc (TR. 7). The Administrative Law Judge stated: *"here the problem is that there is no medical evidence which will in any way support the complaints of the claimant."* (TR. 8) It was also stated that; "his varied background and obvious ability to be versatile gives every reason to conclude *especially in view of the absence of objective medical findings of severe impairments* that the claimant can work at many of his former occupations." (TR. 8)

This decision became the final decision of the Secretary of Health, Education and Welfare when the Appeals Counsel on October 25, 1973, denied the Petitioner's request for review (TR. 3).

On January 7, 1974, suit was commenced in United States District Court for the Eastern District of Michigan, Northern Division, to obtain judicial review, as provided under Section 205 (g) of the Social Security Act, as amended, 42 USCA 405 (g) constituting an appeal from the decision from the Appeals Counsel of the Department of Health, Education and Welfare, Social Security Administration.

June 10, 1975, the Honorable James Harvey, United States District Judge for the Eastern District of Michigan, rendered a judgment that there was substantial evidence to support the Secretary's finding that the claimant's impairments were of such limited severity that they did not qualify under the Act as a disability.

Subsequent to the decision of the District Court the Petitioner filed his claim of appeal in the United States Court of Appeals for the Sixth Circuit. On February 20, 1976, the Court of Appeals rendered a judgment which affirmed the decision of the District Court and concluded that the findings of the Secretary are supported by substantial evidence. The Court of Appeals stated; "*though a number of medical reports are included in the record, no physician stated that the applicant is unable to engage in any substantial gainful activity.*"

May 14, 1976, the Petitioner filed an application for an extension of time in which to file a Petition for a Writ of Certiorari. An Order granting an extension of time in which to file this petition was given on May 18, 1976, extending the time in which to file to and including July 19, 1976.

VI. REASON FOR ALLOWANCE OF WRIT

1. The decision of said Court of Appeals as to the fact that "no physician stated that the applicant (Petitioner) is unable to engage in any substantial gainful activity" is in conflict with the decision of the Court of Appeals for the Fourth Circuit, on the same matter, in the case of Lackey v. Celebrezze, reported in 345 F.2d 76.

2. The decision of said Court of Appeals as to the eligibility of the Petitioner for Social Security disability benefits by holding that the Petitioner is not disabled within the terms of the Social Security Act unless he submits a medical report of a physician stating that he was unable to engage in substantial gainful activity represents an important question of federal law which has not, but should be decided by this Court.

3. The decision of the Court of Appeals as to the eligibility of the Petitioner for Social Security disability benefits by holding that the Petitioner is not disabled within the terms of the Act unless he submits a medical report of a physician stating that he is unable to engage in substantial gainful activity, is the decision of a federal question in a way probably in conflict with the applicable decisions of this Court.

Argument

The Petitioner asks this Court to grant a Writ of Certiorari to the Court of Appeals for the Sixth Circuit because the Court of Appeals abrogated its judicial duty to make a finding under the Social Security Act as it is written and has been applied, and instead substituted a requirement for eligibility for disability not found within the Act. The Court of Appeals, in affirming the decision of the District Court and the Secretary, stated that; "though a number of medical reports are included in the record, no physician stated that the applicant is unable to engage in any substantial gainful activity."

Petitioner contends that under the Social Security Act as written and as it has been applied, he is required to show through objective medical evidence the presence of a medically determinable physical impairment. Further, Petitioner believes that evidence in the record is sufficient to sustain this burden and the Court of Appeals apparently acquieses in this opinion as it made no mention of this issue in its decision.

However, the Social Security Act does not require that a Petitioner submit objective medical evidence demonstrating that his impairments cause an inability to engage in substantial gainful activity; but rather, this is a subjective question to be decided initially by the Social Security Administration and upon appeal by the courts.

Therefore, Petitioner contends that the Court of Appeals was in derogation of its judicial duty to make such its objective evaluation of his case when it imposed the additional requirement that he medically prove through a physician's

statement that his impairments rendered him unable to engage in substantial gainful activity.

It is further contended that the imposition of such a requirement by the Court of Appeals constitutes legislating on the part of the judiciary in an area of great public concern and importance which action is in conflict with the constitutional delegation of the separation of powers.

Clearly, there was sufficient medical evidence as well as subjective evidence of the Petitioner to support the findings that the Petitioner was unable to engage in a substantial gainful activity. The evidence in the record shows the Petitioner to have psychoneurosis, hypogonatism, hemophilia, obesity, tobacco bronchitis, visual problems, knee problems, back problems, and other severe pain. The evidence also shows the Petitioner to have a low intelligence, no vocational training, few skills and severe emotional problems.

In light of these facts the Petitioner contends that his inability to engage in substantial gainful activity is clear or at least should have been realistically determined upon the evidence in record. Petitioner believes that the Court of Appeals could not under the authority granted it by the Constitution of the United States abrogate its duty to make a finding on the facts in the record and instead impose upon Petitioner and the public a new requirement for eligibility which is not derived from the Act and which is in conflict with the decision of other United States Court of Appeals and United States Supreme Court.

VII. CONCLUSION

WHEREFORE, RONALD V. FALES, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above entitled case.

Respectfully submitted,

BOWER & ROGERS

By: HENRY A. ROGERS
Counsel for Petitioner

Business Address:
121½ McDonald Street
Midland, Michigan 48640

APPENDIX

I. The Decision of the Administrative Law Judge denying RONALD V. FALES (Soc. Sec. No. 382-24-9063) Social Security disability benefits which decision was entered October 25, 1973.

HEARING DECISION

This case is before the administrative law judge on a request for hearing filed by the claimant.

ISSUES

The general issues before the administrative law judge are whether the claimant is entitled to a period of disability and to disability insurance benefits under Sections 216 (i) and 223, respectively, of the Social Security Act, as amended. The specific issues are whether the claimant was under a "disability," as defined in the Act and, if so, when such "disability" commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement.

LAW AND REGULATIONS

Section 216(i) of the Social Security Act provides for the establishment of a period of disability, and Section 223 of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 223(d)(1) of the Social Security Act defines disability (except for certain cases of blindness) as the "inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

Section 223(d)(2)(A) further provides that "an individual (except a widow, surviving divorced wife, or widower for purposes of section 202(e) or (f)) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country."

Section 223(d)(3) further states "For purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinic and laboratory diagnostic techniques."

Section 404.1524(c) of the Regulation No. 4 states, in part, that the "evidence shall also describe the individual's capacity to perform significant functions such as the capacity to sit, stand, or move about, travel, handle objects, hear or speak, and, in cases of mental impairment, the ability to reason or to make occupational, personal, or social adjustments."

EVIDENCE CONSIDERED

The administrative law judge has carefully considered all the testimony at the hearing, and the exhibits described in the List of Exhibits attached to this decision.

EVALUATION OF THE EVIDENCE

Medical evidence indicates that claimant had a chronic lumbar sprain as of April 6, 1970. Psychiatric examination

conducted on May 25, 1970, indicated no mental disorders. A psychological examination on May 11, 1970, indicated an IQ of 75, performance IQ of 100 and full scale IQ of 85. He was diagnosed on January 18, 1970, as being psychoneurotic, exogenous obesity, tobacco bronchitis, and hypogonadism. An internist examination of January 22, 1971, suggested a psychiatric evaluation which was performed on April 12, 1973, and the physician found no mental illness. There are indications that his major problem was obesity.

The claimant last meets the earnings requirements through September 30, 1971. He was born April 25, 1928, is age 45, married, and has no children. His wife, Melva M. Fales, also testified at the hearing. He has a 6th grade education, reads very little, has difficulty comprehending what he reads, has difficulty writing, is 5 feet, 9-½ inches tall, and weighs 258 pounds which he has weighed approximately 4 years. He does some housework, walks very little, shops with his wife, has a good appetite, is not on a diet presently, can take care of her personal needs without assistance, has difficulty sleeping, has worked as a drill press operator, riveter, steeplejack, truck driver, demolition expert, coal mine worker, pipefitter, electrican's helper, copper mine worker, oil field worker, baker's helper, and painter. He received $5,000 in workman's compensation benefits in 1969 and receives $130 monthly for a non service connected veteran's pension. His wife receives $213.32 monthly in benefits.

The claimant complained primarily of his legs and back with shooting pains to the head which cause him to have headaches. He also has muscle spasms underneath his heart, extending to the back. He is a hemophillac, has a pin in his shoulder and has difficulty with his legs. They were swollen at the time of the hearing. He takes valium, thorazine, and cortizone shots in his kneecaps. He complained of pain, severe headaches, and falling out resulting from paralyzed legs.

Here the problem is that there is no medical evidence which will in any way support the complaints of the claimant. A careful examination by competent physicians of both the

mental and physical aspects of the claimant's allegations reveal without conflict that the claimant is capable of working. His varied background and obvious ability to be versatile gives every reason to conclude especially in view of the absence of objective medical findings of severe impairments that the claimant can work at many of his former occupations. It must be concluded then that claimant is not disabled, as that term is understood under the Social Security Act, as amended.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Administrative Law Judge has carefully considered the entire record in this case and, based on the preponderance of the credible evidence, makes the following specific findings:

1. The claimant's insured status for disability insurance benefit purposes extends through September 30, 1971.
2. Claimant is approximately 45 years of age, has a sixth grade education, and has worked as baker's helper, steeplejack, electrician's helper, truck driver, and other jobs listed above.
3. The claimant has the following medical impairments: obesity, psychoneurosis, hypogonadism, hemophelia, tobacco bronchitis, etc.
4. The claimant's impairments have been of such limited severity that taking into account claimant's age, education, work history and general background claimant has been capable of engaging in substantial gainful activity during the claimed period of disability as a baker's helper, and some of his other occupations.
5. The claimant's impairments have not prevented claimant from engaging in substantial gainful activity for a continuous period of twelve months or longer.

6. The claimant has not been under a "disability" as that term is defined under the Social Security Act, as amended, at any time on or prior to September 30, 1971.

DECISION

Accordingly, it is the decision of the Administrative Law Judge that, based on claimant's application filed June 27, 1972, the claimant is not entitled to a period of disability or to disability insurance benefits under the provisions of Sections 216(i) and 223, respectively, of the Social Security Act, as amended.

Date: October 25, 1973

(s) W. Howard O'Bryan, Jr.
W. Howard O'Bryan, Jr.
Administrative Law Judge

II. Bureau of Hearings and Appeals denial of the petitioner's request for a review of the decision of the Administrative Law Judge.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Social Security Administration
P.O. Box 2518, Washington, DC 20013

REFER TO: IBA-2
382-24-9063

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Ronald V. Fales
6031 Jack Road
Rural Route 1
Midland, Michigan 48640

Dear Mr. Fales:

Your request for review of the administrative law judge's decision has been carefully considered by the Appeals Council. The Council's consideration of your request has included all the evidence in your case, the law and regulations applicable to your claim, the evaluation of the facts and the reasoning in this decision, and your reasons for believing your claim should be allowed.

The Appeals Council has concluded that this decision is correct. Further action by the Council would not, therefore, result in any change which would be of advantage to you. Accordingly, the administrative law judge's decision stands as the final decision of the Secretary in your case.

If you desire a review of the decision by a court, you may commence a civil action in the district court of the United States in the judicial district in which you reside *within sixty (60) days* from this date. See section 205(g) of the Social Security Act, as amended (section 405(g), Title 42, United States Code). If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant.

Sincerely yours,

Thomas J. Donnelly
Member, Appeals Council

III. The Opinion of the United States District Court, Eastern District of Michigan, Northern Division rendered June 10, 1975 in the case of RONALD V. FALES v. SECRETARY OF HEALTH, EDUCATION AND WELFARE; Civil Action No. 74-10046.

ORDER

At a session of said court held in the Federal Building, Flint, Michigan, on June 10th, 1975.

Present: HONORABLE JAMES HARVEY
United States District Judge

IT IS HEREBY ORDERED that plaintiff's Motion for Summary Judgment is hereby DENIED and that defendant's Motion for Summary Judgment is hereby GRANTED and the decision of the Secretary of Health, Education and Welfare is AFFIRMED, for the reasons set forth in a Memorandum Opinion of the Court entered on this date.

(s) James Harvey
United States District Judge

MEMORANDUM OPINION

This action is before the Court on motions for summary judgment filed by the plaintiff Ronald V. Fales and the defendant Secretary of Health, Education and Welfare, arising on appeal from a denial of disability benefits under the Social Security Act, 42 USC 405(g).

Mr. Fales, born April 25, 1928, is forty-seven (47) years of age, married and has no children. He has a sixth-grade education with an intelligence of dull-normal. Physically, he is described as obese, standing 5 feet 9-½ inches and weighing 258 pounds. His work experience includes a wide variety of semi-skilled positions. He has worked for varying lengths of time as a drill press operator, riveter, steeple jack, truck driver, demolition expert, coal mine worker, pipefitter, electrician's helper, copper mine worker, oil field worker, painter and baker's helper. He claims to have been disabled in December of 1969. The Secretary found that he last met the earning requirements through September 30, 1971.

Mr. Fales appeared and testified before an Administrative Law Judge October 16, 1973. Although he appeared without benefit of counsel, having waived the right, it appears from the record that the evidence was fully presented and the issues adequately developed.

At the hearing, appellant complained primarily of pain and swelling in his legs which sometimes developed into a paralysis causing him to fall. He also claimed to have a pain in the lower back with sporadic shooting pains to his head causing severe headaches. Painful muscle spasms underneath the heart also extended to his back.

The Administrative Law Judge found that the claimant had the following medical impairments: "obesity, psychoneurosis, hypogonadism, hemophilia, tobacco bronchitis, etc." However, these ailments were believed not to be of such disabling severity as to prevent the claimant from engaging in substantial gainful activity during the period when he met the special insured status requirements.

The scope of this Court's review is determined by 42 USC 405(g) which provides that "The findings of the Secretary as to any fact if supported by substantial evidence, shall be conclusive . . ." Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and it must be based upon the record as a whole." *Celebrezze* v *Bolas,* 316 F2d 498, 501 (8th Cir 1963); *Thomas* v *Celebrezze,* 331 F2d 541, 543 (4th Cir 1964).

A disability as defined under the Social Security Act, 42 USC 423(d)(1)(A) is the "inability to engage in any substantial gainful activity by reason of any medically-determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."

The issue presented to this Court is whether there is substantial evidence for the Secretary's finding that the claimant's impairments were of such limited severity that they did not qualify under the Act as a disability.

This Court has reviewed all of the evidence submitted and it is apparent from the medical reports submitted that the claimant has undergone extensive examinations for both psychological and physical impairments. It is also apparent from these reports and the testimony at the hearing that claimant has suffered from a variety of injuries; specifically, a groin injury and shoulder dislocation in 1954 requiring surgery, an eye injury in 1963 which resulted in a restricted field of vision, a back injury in 1965 and a blow to the head in 1967. There is also evidence of a mental disorder although psychiatric examinations revealed no such disorder. Further, claimant alleges he suffers from hemophilia.

While there is ample evidence of examination and treatment as to the above mentioned injuries, they fail to indicate an impairment, either singly or cumulatively, which is sufficiently debilatating to qualify as a disability under the act in light of Mr. Fales' wide experience in different jobs.

There is also persuasive evidence that a reduction in weight would substantially ease the claimant's problems. The record does not show that Mr. Fales cannot lose weight. If an impairment reasonably can be remedied by treatment, it cannot serve as a basis for a finding of disability. *Henry* v *Gardner,* 381 F2d 191 (6th Cir 1967). Accordingly, courts have held that obesity is not necessarily disabling where the condition is remediable. *Stillwell* v *Cohen,* 411 F2d 574 (5th Cir 1969).

The Court does not disregard Mr. Fales' subjective allegations of pain and discomfort. Pain alone can be a disabling factor and must be considered in determining the validity of a claim. *Sayers* v *Gardner,* 380 F2d 940 (6th Cir 1967); *Miracle* v *Celebrezze,* 351 F2d 361 (6th Cir 1965). However, in considering all of the evidence, the Court finds that there is substantial evidence to support the Secretary's denial of disability.

The plaintiff's motion for summary judgment is denied. The motion for summary judgment by the defendant is granted and the decision of the Secretary is affirmed.

(s) James Harvey
United States District Judge

Dated: June 10, 1975

IV. The decision of the United States Court of Appeals for the Sixth Circuit which decision was entered February 20, 1976 in the case of *Ronald* V. Fales v. Secretary of Health, Education and Welfare; Civil Action No. 75-1882.

O R D E R
(Filed February 20, 1976)

BEFORE: EDWARDS, PECK and LIVELY, Circuit Judges.

On appeal from denial by the Secretary of Health, Education and Welfare of his application for Social Security disability benefits the claimant contends that the cumulative effect of several physical impairments and consequent pain results in his being unable to perform the work required in any of his previous occupations. The administrative law judge found claimant capable of performing several of his past occupations. Though a number of medical reports are included in the record, no physician stated that the applicant is unable to engage in any substantial gainful activity. Upon consideration of the record as a whole, the court concludes that the findings of the Secretary are supported by substantial evidence. Accordingly, the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

Supreme Court, U. S.
FILED
OCT 13 1976
MICHAEL RODAK, JR., CLERK

No. 76-74

In the Supreme Court of the United States

OCTOBER TERM, 1976

RONALD V. FALES, PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-74

RONALD V. FALES, PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

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Petitioner challenges a final decision of the Secretary of Health, Education, and Welfare, upheld by the district court and court of appeals, denying him disability insurance benefits.

The administrative law judge, after a full hearing, found that petitioner suffered from "obesity, psychoneurosis, hypogonadism, hemophelia, tobacco brochitis, etc." (Pet. App. 15) and noted that petitioner complained of pain in his legs and back, as well as severe headaches (Pet. App. 14). However, the administrative law judge concluded: "A careful examination by competent physicians of both the mental and physical aspects of the complainant's allegations reveal without conflict that the claimant is capable of working" (Pet. App. 14-15).

The petitioner's varied work background,[1] the administrative law judge observed, "gives every reason to conclude especially in view of the absence of objective medical findings of severe impairments that the claimant can work at many of his former occupations" (Pet. App. 15). He found petitioner not to be "under a disability," as that term is defined in Section 223(d) of the Social Security Act, as amended, 42 U.S.C. 423(d) (Pet. App. 16).

Petitioner sought review of this decision in the United States District Court for the Eastern District of Michigan pursuant to Section 205(g) of the Act. The district court, while recognizing petitioner's subjective allegations of pain and discomfort, also noted (Pet. App. 20) "persuasive evidence that a reduction in weight would substantially ease the claimant's problems." The court then concluded that, viewing the evidence in its entirety, there was substantial evidence to support the Secretary's denial of disability. The court of appeals affirmed, holding that there was substantial evidence to support the decision of the Secretary (Pet. App. 21).

Contrary to petitioner's contentions, the opinion of the court of appeals announces no new law. Nor does its judgment conflict with any other decision.[2]

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[1]There was evidence at the hearing that petitioner had worked as a drill press operator, riveter, steeplejack, truck driver, demolition expert, coal mine worker, pipefitter, electrician's helper, copper mine worker, oil field worker, baker's helper, and painter (Pet. App. 14).

[2]In particular, there is no conflict with *Lackey* v. *Celebrezze*, 349 F. 2d 76 (C.A. 4). The court of appeals in *Lackey* found, on the particular facts of that case, that the Secretary's decision to deny disability benefits was not supported by substantial evidence largely because the administrative law judge had disregarded the combined effects of the claimant's numerous severe physical ailments, including both emphysema and possible heart disease.

Petitioner contends (Pet. 2) that the court of appeals has announced a new requirement that "a physician must state that the [claimant] is unable to engage in any substantial gainful activity prior to [claimant] being eligible for disability benefits under the Act." The contention is without merit. While the court of appeals noted in this case that "no physician stated that the applicant is unable to engage in any substantial gainful activity" (Pet. App. 21), the court did not in fact announce a rule requiring physicians expressly to make such statements. To obtain disability insurance benefits, an applicant must furnish "medical and other evidence," 42 U.S.C. 423(d)(5), showing that he cannot engage in his previous work or "in any other kind of substantial gainful work which exists in the national economy," 42 U.S.C. 423(d)(2)(A). In this case, the administrative law judge found (Pet. App. 14-15) that petitioner's medical evidence established discomfort but not disability. The district court and the court of appeals merely recognized that substantial evidence supported that finding.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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